

EPA's Proposed Rule on Waters of the United States

April 1, 2014

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Proposed Rule

- On March 25, 2014, agencies released:
 - Proposed Rule (not yet published in Federal Register)
 - Economic Analysis of Proposed Rule
 - Interpretative Rule on 404(f)(1)(A) Exemptions for Normal Farming, Silviculture, and Ranching Activities
 - Fact Sheet on Agriculture Exemptions and Exclusions

Proposed Rule

- Agencies held numerous stakeholder calls on March 25 to introduce the rule
- EPA to hold webinar on proposed rule on April 7
- Other stakeholder outreach events planned around the country
- Once published in the Federal Register, 90-day public comment period
- Invites public comment in several places in the rule

Connectivity Report and SAB Process

- Connectivity Report developed by EPA's Office of Research and Development released on Sept. 17, 2013
 - Science to support the rule
- Science Advisory Board (SAB) panel convened to "peer-review" the report
 - SAB panel held public meeting Dec. 2013 to review the EPA report and make recommendations on it

SAB Review

- SAB will hold public teleconferences on Apr. 28 and May 2 on SAB panel's draft review of the EPA report (will allow public statements)
- SAB panel intends to submit final SAB report with recommendations to EPA in July 2014
- EPA will review recommendations and incorporate as it deems fit into the final Connectivity report
- EPA says it will not issue final rule until report is final

2014 Proposed Rule

- The Proposed Rule replaces the definition of “navigable waters” and “waters of the United States” in the regulations for all CWA programs, and in particular sections 311, 401, 402, and 404:
 - 33 C.F.R. § 328.3: Section 404
 - 40 C.F.R. § 110.1: Oil Discharge Rule
 - 40 C.F.R. § 112.2: Spill Prevention, Control and Countermeasure Plan
 - 40 C.F.R. § 116.3: Designation of hazardous substances
 - 40 C.F.R. § 117.1(i): Notification of discharge of hazardous substances required
 - 40 C.F.R. § 122.2: NPDES permitting and Storm Water
 - 40 C.F.R. § 230.3(s) and (t): Section 404
 - 40 C.F.R. § 232.2: Section 404 exemptions
 - 40 C.F.R. § 300.5: National Contingency Plan for oil discharges
 - 40 C.F.R. § 300, Appendix E to Part 300, 1.5: Structure of plans to respond to oil discharges
 - 40 C.F.R. § 302.3: Petroleum exclusion
 - 40 C.F.R. § 401.11: Effluent limitations

All CWA Programs

- While the Proposed Rule *applies to all CWA programs*, the agencies do not explain any of the implications on these programs
- Strong need to evaluate the implications on these other programs; greatest impact of the definitional changes will be on these other programs

WOTUS Under the Proposed Rule

1. All waters currently, in the past, or may be susceptible to use in interstate or foreign commerce, including tidal waters;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in 1-3 above;
5. All **tributaries** of waters identified in 1-4 above;
6. **All waters, including wetlands, adjacent to waters** identified in 1-5 of this section; and
7. On a case-specific basis, **other waters**, including wetlands, that alone or in combination with other similarly situated waters in the region have a **significant nexus** to a water identified in paragraphs 1-3

New Definitions in Proposed Rule

- **Tributary:**
 - Water body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies to waters in 1-4.
 - A water **does not lose its tributary status if there are man-made breaks** (such as bridges, culverts, pipes, dams) so long as bed and bank can be identified upstream of the break.
 - A wetland, pond, or lake can be a tributary, even if it lacks an OHWM and bed and bank, provided it contributes flow to 1-3.
 - **A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).**

Tributary Definition

- The rule, for the first time ever, specifically defines ditches as jurisdictional tributaries under all CWA programs
 - Roadside ditches
 - Irrigation ditches
 - Stormwater ditches
- Other man-made conveyances that drain or connect also qualify as tributaries
- Huge practical consequences that have yet to be evaluated

Ditch Exclusions

- Ditches ***excavated wholly in uplands*** and that ***drain only uplands*** and ***have less than perennial flow***
 - “In uplands means ditches at no point along their length are excavated in a wetland or other water.”
 - Historical evidence will be necessary to prove that excavated wholly in uplands, etc.
 - Drain only uplands means that no wetlands drain to the ditch
- Ditches that do not contribute flow either directly or through other water bodies to a water in 1-3 above

Ditches Created for Beneficial Purposes

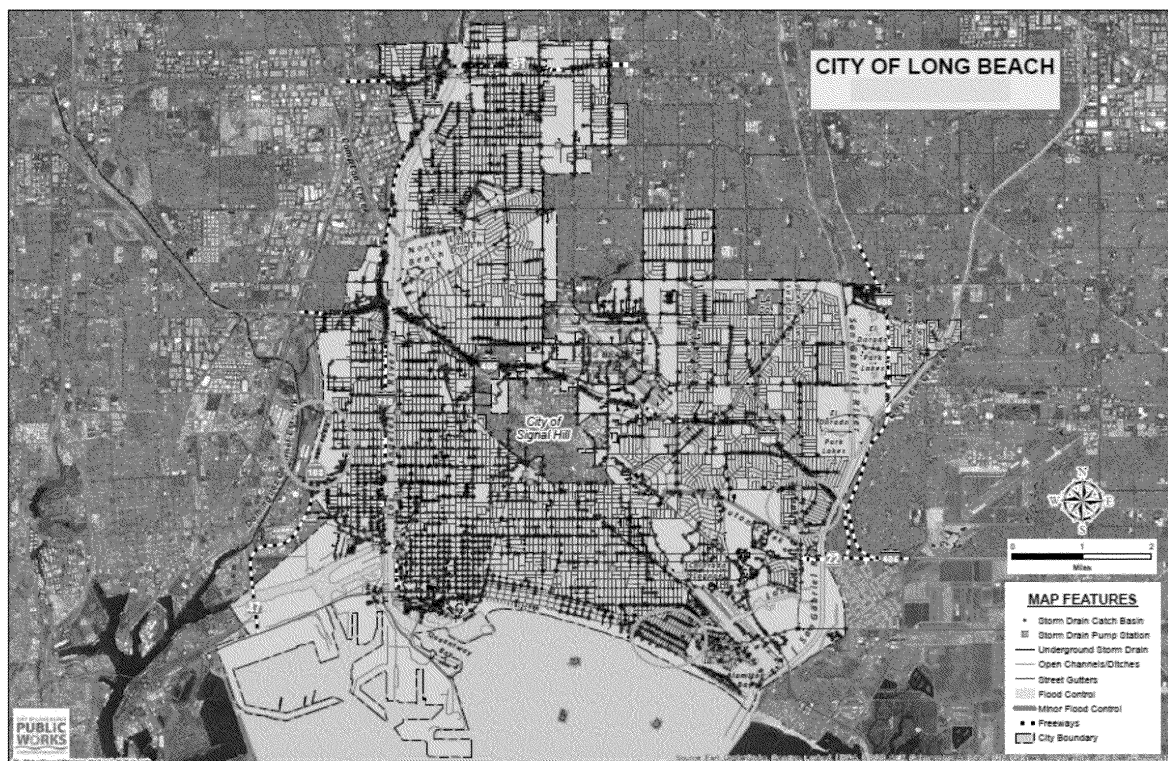
- The agencies specifically acknowledge that:
 - “Ditches may have been created for a number of purposes, *such as irrigation, water management or treatment, and roadside drains.*” **BUT**
 - “In order to be excluded, the ditch must be **excavated wholly in uplands, drain only uplands, and have less than perennial flow.**”

- Roadside ditch constructed and maintained by Wicomico County, Maryland roads department





Stormwater channel that is part of MS4 in CA



System of gutters, open ditches, and pipes that make up
stormwater system in CA

Why Does Jurisdiction Over Ditches (Waters) Matter?

- **Enforcement/likelihood for potential illegal discharges**
 - Is a 402 or 404 permit required? Where is the discharge point?
 - Are you complying with your permit – meeting water quality standards, discharge limits? At what point is that required?
- **Type of permit:** General or individual
- **“Federal action” triggers:** NEPA, ESA, NHPA, 401 water quality certification, etc.
- **Mitigation**
- **Third-party citizen suits**

Third-Party Litigation

- EPA wants a broad rule that gives the agency latitude to exert jurisdiction where it deems desirable; however, uncertainty and gray areas breed litigation
- CWA allows for citizen suits over discharges EPA and Corps have elected not to regulate.
 - *Baykeeper*: Citizen suit over discharge within an industrial facility that agencies determined were not subject to permit requirements
- Under the CWA, local government officials and employees can be held criminally and civilly liable. Local officials have to deal with the expense and bad publicity of fighting litigation over the scope of permitting requirements

Recent District Court Ruling Vacating Water Transfer Rule

- *Catskill Mountains Chapter of Trout Unlimited, Inc. et al v. EPA* (S.D.N.Y. Mar. 31, 2014)
 - Judge vacated EPA’s rule exempting water transfers from NPDES permitting requirements and remanded to EPA to reexamine the rule.
 - Court found that even when the waters being transferred meet state water quality criteria, transfers risk introducing pollutants in recipient waterbodies and should be subject to NPDES requirements.

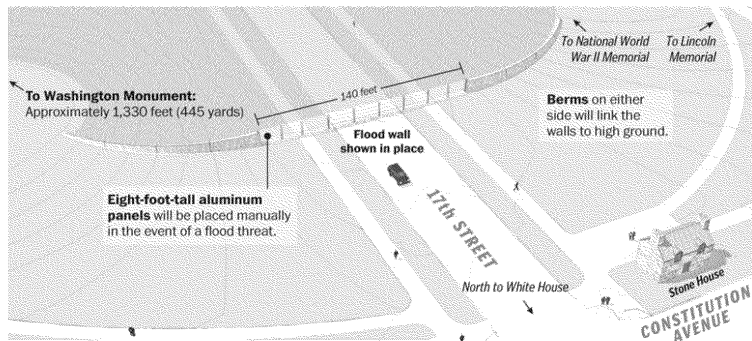
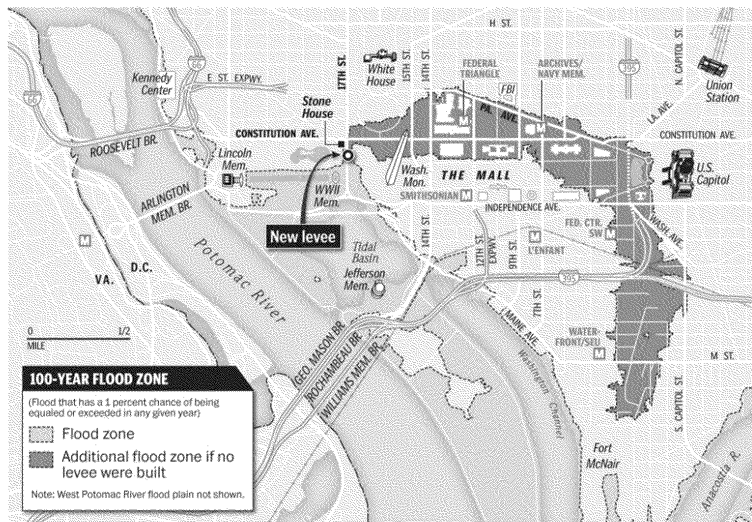
Other New Definitions in Proposed Rule

- **Adjacent:** Bordering, contiguous, or **neighboring** waters separated from other WOTUS by dikes, or barriers are adjacent waters
- **Neighboring:** Waters located within a **riparian area** or **floodplain** or waters with a shallow subsurface connection or confined surface hydrologic connection
 - **Riparian area:** Transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community of the area ...
 - **Floodplain:** An area bordering inland or coastal areas that ... is inundated during periods of moderate to high water flows

Riparian Areas and Floodplains

- Nearly every city and county in the U.S. have these areas
- Flood frequency (e.g., 5-year, 100-year, 500-year floodplain) is not defined, but is left to agencies' "best professional judgment."
 - FEMA spends about \$100 million annually mapping floodplains (primarily 100-year and sometimes 500-year). If EPA decides a smaller floodplain is more appropriate, it would be much more difficult and expensive to define
- No federal agency maps riparian areas, so would fall to EPA to define riparian area for every part of the country

Washington, DC Floodplain





Industrial Ponds Along the Arkansas River



Significant Nexus Definition in Proposed Rule

- **Significant Nexus:**
 - Means a more than speculative or insubstantial effect that a water or wetland has either or alone or in combination with other waters in the region on waters 1-3.
 - Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together so that they can be evaluated as a single landscape unit.

Exclusions in Proposed Rule

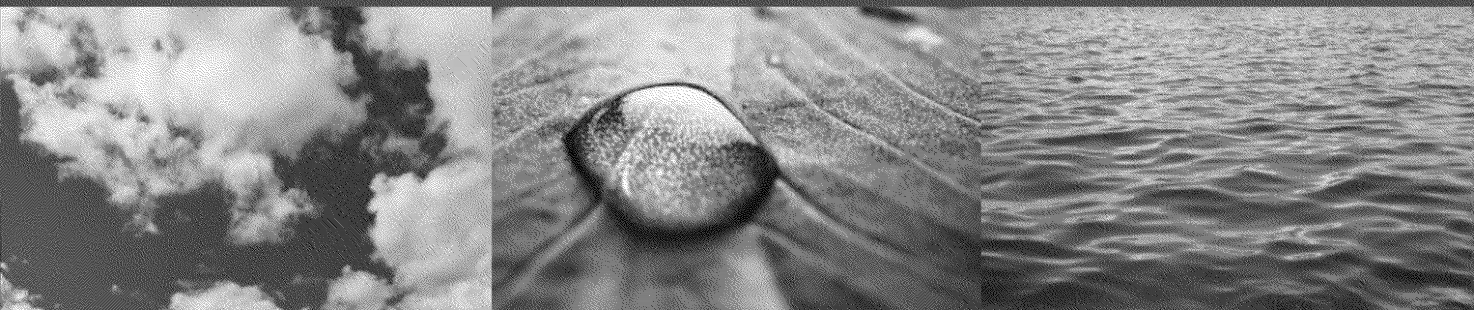
- Waste treatment systems, including treatment ponds or lagoons, ***designed to meet the requirements of the Clean Water Act***;
- Prior converted cropland;
- Ditches ***excavated wholly in uplands*** and that ***drain only uplands*** and ***have less than perennial flow***; and
- Ditches that do not contribute flow either directly or through other water bodies to a water in 1-3 above

Exclusions in Proposed Rule

- Artificially irrigated areas that would revert to uplands should irrigation cease
- Artificial lakes or ponds created in dry land and used exclusively for stock watering, irrigation, settling basins, or rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions from construction
- **Groundwater**, including groundwater drained through subsurface drainage systems
- Gullies, rills, and ***non-wetland swales***

Federalism Consultation?

- EPA says that: “This action will ***not*** have substantial direct effects on the states... Thus, EO 13132 does not apply to this action.” (emphasis added)
- EPA notes that it held three in-person meetings and two phone calls with State and local groups in the fall/winter of 2011
- EPA, however, is “specifically” soliciting comments from state and local officials on the rule



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